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JAMES R. BROWN, [illegible]

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 660

CORNELIUS H. DOHERTY, *Petitioner*,

vs.

DAVID G. BRESS, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petition of Cornelius H. Doherty for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit entered on the 20th day of November, 1958, affirming a judgment against your petitioner and in favor of the respondent in the sum of Ten Hundred Fifteen Dollars ($1015.00) entered in the United States District Court for District of Columbia on the 9th day of January, 1958, respectfully shows:

The opinion of the United States Court of Appeals for the District of Columbia has not been officially reported at the time this is written but a copy is appended to this petition. The judgment of the Court is dated November 20, 1958.

A motion for a rehearing was denied on December 19, 1958, and a motion to stay the mandate was granted to and including January 22, 1959.

THE BASIS OF THE COURT'S JURISDICTION

The jurisdiction of this Court is based on Title 28, U. S. C. A., Section 1254 (1).

The judgment of the United States Court of Appeals for the District of Columbia Circuit is in conflict with the decision of this Court in *Sprague* v. *Ticonic National Bank*, 307 U. S. 161, 59 S. Ct. R. 777.

The decision of the United States Court of Appeals for the District of Columbia Circuit is in conflict with its own decisions in *Washington Gas Light Company* v. *Baker*, 90 U. S. App. D. C. 98, 195 F. (2d) 29; *Fletcher* v. *Coomes, et al*, 52 App. D. C. 159, 285 F. (2d) 893, and *Pink, et al* v. *Farrington, et al*, 67 App. D. C. 314, 92 F. (2d) 465.

The decision of the United States Court of Appeals for the District of Columbia is based on a premise not supported in any way by the record in that it states that Hartford stipulated with appellee (respondent) to be bound by the decision of "test" cases when the record, in fact, discloses that there was no such stipulation and that Hartford specifically refused to enter into any agreement with appellee (respondent).

This petition raises a question of public policy covering the relationship of attorney and client and the right of any Court, in the absence of statutory authority, agreement or a common fund in control of the Court, to take from an attorney, in a proceeding in which he is not a party, a fee which has been awarded to him by another Court and award it to an attorney who did not represent the party nor ever entered his appearance in that cause.

This petition raises the question as to the right of a United States District Court, on a petition to award a fee

on a quantum meruit basis, to allow a fee without any evidence as to the services performed or benefit received as being against public policy and being such a departure from the normal and accepted course of judicial procedure as to require the exercise of this Court's power of supervision.

This petition raises the question as to the right of a United States District Court and the United States Court of Appeals for the District of Columbia Circuit to take from petitioner, in a proceeding in which he was not a party, a fee awarded to him by another Court as being the taking of property without due process of law.

QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the District of Columbia Circuit in error in holding that an attorney, representing a client in a case growing out of a common air disaster, must share his fee with another attorney who has tried his own case first where all parties to the pending litigation stipulated, under the Court's direction, to await and be bound by the outcome of such case on two issues common to all the litigation, without the benefit of any statute, agreement between the attorney or party, and without any fund being within the control of the Court?

2. Was the United States Court of Appeals for the District of Columbia Circuit in error in holding that the respondent, on a petition to award him a fee on a quantum meruit basis, was entitled to a specific portion of the fee awarded to the petitioner by another Court where there was no evidence of any agreement between the parties for a division of the fee and no evidence taken or required for a finding as to what would be a reasonable or fair fee under the circumstances?

3. Was the United States Court of Appeals for the District of Columbia Circuit in error in holding that respondent

was entitled to 7 per cent of the gross amount received in settlement of Hartford's claim in accordance with the terms of the syndicate agreement where the record discloses that petitioner and his client refused to be a party to the syndicate agreement, headed by respondent, and being an interference with the relationship of attorney and client and making the Court a third party to any agreement between attorney and client?

4. Was the action of the United States Court of Appeals for the District of Columbia Circuit, in affirming the action of the United States District Court for the District of Columbia in taking a part of a fee awarded your petitioner by another Court in a proceeding, in which petitioner was not a party, a taking of property without due process of law?

STATEMENT OF CASE

The Hartford Accident and Indemnity Company, hereinafter referred to as "Hartford", filed an action against the United States in a wrongful death claim growing out of the air collision of November 1, 1949, at Washington Airport, in the United States District Court for the District of Columbia as a subrogee of the Estate of Theodore M. Riehle, who was killed in the accident, consent being given by the provisions of Chapter 171 of Title 28 of the United States Code Annotated.

Hartford was represented by petitioner. After the filing of this action, numerous representations were made to petitioner to join a so-called syndicate composed of a number of parties to actions growing out of the air collision. The agreement stated that respondent had been selected by the syndicate to represent the parties and for which services he was to receive 7 per cent of the gross amount received. In addition thereto, all costs, including out-of-pocket expenses, trial, secretarial and other costs incident to the proceedings were to be paid by the parties to respondent and each signatory to the agreement was to

immediately deposit $100.00 (R. 4-7). Hartford refused to join the syndicate for Hartford's case was only against the United States and the negligence of the United States, if any, could be proved or disproved by a few available witnesses and desired to try its own case (R. 13-15).

The first cases to come on for trial was called the Miller cases and whether the firm of Newmyer and Bress was counsel for the plaintiffs therein or respondent by virtue of his agreement with the syndicate, they were to be tried in October of 1952.

After numerous discussions before Judge Matthew H. McGuire, a stipulation was entered into by the parties to all the actions whereby they, for the purpose of saving the time and expense which would be necessitated by separate and multiple trials, agreed to be bound by the finding in the Miller cases on two of the issues common to all, that is, liability and the applicable death statute. The question of damage and other issues were left untouched. The firm of Newmyer and Bress, as attorney for some eighty-five parties, signed the stipulation on behalf of their clients (R. 7-10).

The respondent, in accordance with his apparent agreement as counsel for parties in the Miller cases or as counsel for the syndicate, tried the Miller cases and a final judgment entered in favor of Miller against the United States and Eastern.

Some time after the signing of the Court's stipulation, Hartford, after numerous requests, did contribute $375.00 toward the expenses of the Miller cases.

Some time after the final decision in the Miller cases, Hartford settled its case for $14,500.00 and a stipulation of compromise, entered into by the parties, approved by Judge McGuire, the United States District judge who had handled all the litigation growing out of the air disaster from beginning to end, allowed petitioner $2900.00 representing that it

was a reasonable attorney's fee in accordance with 28 U. S. C. 2678 (R. 10-11).

Respondent filed his petition to enforce an attorney's lien stating that the syndicate had agreed to give him 7 percent of the gross receipts and that Hartford had refused to become a party to such an agreement and praying that the Court set aside the stipulation of compromise between the United States and Hartford and directing the United States to pay to respondent, on a quantum meruit basis, an amount equal to the reasonable and fair value of the services resulting in benefit to Hartford (R. 12-14).

Hartford filed an answer to the petition denying any agreement with the respondent and that the services performed by respondent were required by an agreement with his own client and that there was nothing contained in the stipulation that would indicate in any way that respondent would or could ever ask for a fee for his services (R. 15-16).

The petition was heard before Judge Alexander Holtzoff, not by Judge Matthew H. McGuire who had allowed petitioner his fee and the Court made its finding, without taking any testimony other than permitting a copy of the syndicate agreement to be submitted to him, in an order allowing attorney's fee and stating that respondent rendered legal services in this cause which have benefited Hartford for which he is equitably entitled to compensation out of the settlement fund and directed the United States to pay respondent $1015.00, being the sum of 7 per cent of the gross amount of the settlement out of the fee previously ordered to be paid your petitioner (R. 16-17).

The United States Court of Appeals for the District of Columbia Circuit affirmed the judgment upon the premise that Hartford, together with other plaintiffs, stipulated with appellee (respondent) to be bound by the decision of "test" cases which became known as the Miller cases.

ARGUMENT

United States Court of Appeals for the District of Columbia Circuit Has Misconceived the Law as Stated in the Applicable Decision of this Court and Misapplied That Law to the Facts in this Case.

The United States Court of Appeals for the District of Columbia Circuit, in its opinion on page 2, said:

> "To save time and expense of separate and multiple trials, Hartford, together with other plaintiffs, stipulated with appellee to be bound by the decision of 'test' cases which became known as the Miller cases. Appellee was attorney for the plaintiffs in the Miller and numerous other cases."

The record is clear that Hartford never stipulated with respondent to be bound by the decision of the Miller cases. The only stipulation in the cause was the one that appears on pages 7 to 10 of the record.

The Court again in its opinion, on page 3, said:

> "By entering into the separate agreement to which we have referred, and thus stipulating to await the outcome of the Miller cases and to be bound thereby, underscored by contributing to the costs of this basic litigation successfully conducted by appellee, Hartford we think enlisted the service of appellee to an extent that authorized the District Court, in the exercise of an equitable discretion, to award to appellee a reasonable portion of the attorney's fees to be paid by Hartford."

The record indicates clearly that the Court was confused in its reference to the agreement with the respondent and Hartford, for the Court's statement follows the language of the syndicate agreement to which Hartford was not a party. The wording of the stipulation is plain and the Court would have to add words of its own to arrive at any such conclusion

The Court, in its opinion on page 4, said:

> "The absence of a formal relationship of attorney and client is not decisive. *Sprague* v. *Ticonic Bank*, 307 U. S. 161; *Washington Gas Light Co.* v. *Baker*, 90 U. S. App. D. C. 98, 195 F. 2d 29. While Sprague involved a different factual situation we believe the principles set forth therein are applicable here."

It is contended that neither the facts nor the law of the Sprague case supports the awarding of attorney's fees to the respondent in this case, even if the Court took evidence and it disclosed some benefit to Hartford.

In Sprague certain monies were delivered to the Ticonic Bank in trust and were secured by bonds. The bank went into the hands of a receiver and the petitioner, at her own expense, employed an attorney and filed a petition against the receiver to impress a lien upon the bonds and the Court sustained her claim. It is apparent from the record that her attorney was paid or secured his attorney's fee. By virtue of her action she set up a fund for some fourteen trusts similar to her own and all that the owner of each trust had to do was to file a claim and it would be satisfied. There is no indication that the various owners of the trusts were represented by counsel. The petitioner filed a claim in that cause to require the payment by the beneficiaries of the other trusts of a reasonable counsel fee and litigation expenses out of the fund. This Court indicated that the allowance of such costs was a part of the historic equity jurisdiction of the Federal Courts.

In Sprague the attorney's fee was for services rendered by an attorney in that cause. In this case the respondent never appeared until he filed his petition for a fee on a quantum meruit basis after Hartford had settled with the United States.

The Decision in This Case Is in Direct Conflict with the Decisions of the United States Court of Appeals for the District of Columbia Circuit and Well Considered Decisions of the Highest State Courts.

The United States Court of Appeals for the District of Columbia Circuit, on page 4 of its opinion, cites *Washington Gas Light Company* v. *Baker, supra*, to support its decision. In that case the Court had impounded a fund and after the litigation was over the attorneys representing the claimants moved, in that cause, for an allowance of attorney's fees and costs and the Court held that it was proper to allow attorney's fees and costs out of the fund and the matter was referred to a special master to take testimony covering the services rendered and what would be a reasonable fee.

The rules of the United States District Court for the District of Columbia covering the compensation to attorneys is contained in Rule 16 (a) and is as follows:

> "Allowance by the Court of compensation to an attorney, fiduciary or guardian *ad litem* shall be made only on written motion supported by a statement detailing with particularity the nature and extent of services rendered, the time devoted thereto, the amount claimed therefor, and any prior allowance for services to the claimant or others."

The only pleading filed by respondent in this cause was a petition to enforce a lien (R. 12-14). The United States Court of Appeals for the District of Columbia Circuit, in *Pink, et al.* v. *Farrington, et al.*, 67 App. D. C. 314, 92 Fed. (2d) 465, said:

> "It is our view that, except under statute (which we do not have in this jurisdiction) or where the fund out of which payment of compensation is sought is in court and under the control of the judge or chancellor (which is not the situation here), the non-possessory lien of an attorney is a creature of contract; * * *"

In the case of *Fletcher* v. *Coomes, et al.*, 52 App. D. C. 159, (1922), 285 F. (2d) 893, Cer. Den. 261 U. S. 619, an

attorney was employed by Coemes to prosecute a partition suit and was paid an agreed fee for his services. He sought to subject the funds resulting from the sale of the real estate to a fee as against all the other heirs who shared in the fund. He proceeded on an implied contract growing out of the benefits received or the creation of a fund by his services which inured to the benefit of others, who, in equity, should compensate their benefactors. The Court said:

> "Where, however, partition proceedings are initiated by counsel for one of the parties in interest and the defendants prefer in good faith to be and are represented by other counsel for the protection of their rights, as they see them, in the subject-matter of the litigation, neither justice nor good conscience requires that they should bear, not only the expense incurred by reason of their actual employment of counsel, but also their proportion of compensation for the services of an attorney in whose selection they have had no voice or part."

In the case of *Kellough* v. *Taylor*, 189 Okla. 675, 119 P. (2d) 556 (1941), the Court said:

> "It is uncontradicted that the defendant as a final result of the litigation, was left in a better condition than he would have been had the plaintiff not succeeded in enforcing his claimant's claims against the whole property instead of the one-half interest of the defendant, but under these circumstances the rule enunciated in *Sprague* v. *Ticonic*, 307 U.S. 161. . . does not apply, since the rule is not applicable in ordinary adversary proceedings . . ., nor where there has been neither a creation, addition, or protection of a common fund . . ., nor does it have application where the benefit is merely incidental . . .".

In the case of *O'Doherty, et al.* v. *Bickel, et al.*, 166 Ky. 708, 179 S. W. 848 (1915), O'Doherty, as counsel for certain parties, by his litigation made a settlement available to all parties and the settlement was agreed to by the other parties. They refused, however, to pay an attorney's fee to

O'Doherty. The only question presented was whether O'Doherty was entitled to an attorney's fee from the other claimants who were represented by their own attorney. The Court, among other things, said:

> "The services performed by them in those cases they were in duty bound to perform, under the employment which they accepted. They were not employed by appellees, and they performed no services for appellees. * * * It may be conceded that, as an incidental result of the efforts of appellants on behalf of their clients (the plaintiff in the three original actions), the purchasing bank was led to a desire to settle with all of the pooling shareholders; but benefits derived by appellees in that respect were only incidental benefits which of necessity flowed from the performance by appellants of the services which they were by their clients employed to perform, and which they were in duty bound to perform for them; and for such benefits they cannot claim compensation from appellees, who were not their clients, either by express contract or implication of law . . . as well might it be contended that the attorney who obtains the enunciation of a new doctrine of the law should have compensation from all who are thereafter, in virtue of that doctrine, victorious in the courts."

The respondent in this case did nothing for Hartford and no question of fee was ever raised until after Hartford settled its case and a District Judge, not the one awarding the fee to petitioner, confirmed a compromise agreement that contained a fee that was termed reasonable by that judge.

The respondent, in the *Miller cases*, at most, created a fund for his clients. No one received any part of it, so far as this record discloses, other than the client and himself.

The Court, in Allowing a Fee to the Respondent, Has So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Require This Court to Exercise Its Power of Supervision.

The usual and proper course of procedure in this case would have required the trial Court, in the event it was of the opinion that respondent was entitled to some fee, to either take evidence or refer the matter to a master to take evidence and to make his report. The request for a fee was based on a quantum meruit, and surely the Court should not be permitted to base its findings on a copy of a syndicate agreement as between other parties which was not agreed to by Hartford and who definitely refused to become a party to any such agreement. In the event evidence was taken in the cause it might clearly indicate that the respondent had already received unconscionable sums for the services rendered.

The Trial Court was bound by Rule 16 (a) of its own Rule, which was set out above, which requires a written motion supported by a statement detailing with particularity the nature and extent of the services rendered, the time devoted thereto, the amount claimed therefor, and any prior allowances for services to the claimants or others. Surely nothing like that was done in this case.

The United States Court of Appeals for the District of Columbia Circuit, in its opinion, again went beyond the record when it stated that Hartford stipulated with appellee (respondent) to be bound by the decision of "test" cases which became known as the Miller cases. It has been stated in this petition that that is a definite mis-statement of the record.

There is also before this Court the question of Court interference between the relationship of attorney and client. If this situation were to be permitted the Court would be a third party to every agreement between attorneys where there was any indication that some benefit was received by the client by the action of some other

attorney. In the matter of a common disaster where there would be numerous actions filed, the clients would never know whether the attorney who would first file and try one of the cases might be in a position, with the help of some Court, to require other clients not represented by him to pay other and additional fees which they had never contemplated or agreed to.

The Action of the Court in Taking a Part of the Fee From Your Petitioner Was the Taking of Property Without Due Process of Law.

The petition of the respondent filed in the United States District Court for the District of Columbia was to enforce an attorney's lien on a settlement obtained by Hartford and praying the Court to set aside the stipulation of compromise and to require Hartford to pay to the respondent, on a quantum meruit basis, an amount equal to the reasonable and fair value of the services resulting in benefit to Hartford. Your petitioner was not a party to this proceeding but merely counsel for Hartford (R. 12-14).

Your petitioner had been awarded a fee in the proceeding by another Court and the Court, in its order, which was affirmed on appeal, did not take the sum awarded respondent from the amount due Hartford but took the amount awarded from the fee which was awarded to your petitioner by another judge.

It is unnecessary to cite decisions of this Court to support the theory that when the United States District Court for the District of Columbia took away a part of the fee previously granted to your petitioner, when your petitioner was not a party to such a proceeding, and the judgment was affirmed by the United States Court of Appeals for the District of Columbia Circuit, that such taking from your petitioner was the taking of property without due process of law and in violation of the constitutional rights of your petitioner.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

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APPENDIX

(Filed Nov. 20, 1958)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14335

CORNELIUS H. DOHERTY, APPELLANT

v.

DAVID G. BRESS, APPELLEE

Appeal from the United States District Court for the District of Columbia

Decided November 20, 1958

Mr. Cornelius H. Doherty, appellant pro se.
Mr. Leonard Braman, with whom *Mr. David G. Bress*, appellee, was on the brief for appellee.

Before EDGERTON, WILBUR K. MILLER and FAHY, *Circuit Judges.*

FAHY, *Circuit Judge:* The appeal involves the allowance of attorney's fees. Appellant was attorney for the Hartford Accident and Indemnity Company[1] in a wrongful death action against the United States under the Federal Tort Claims Act as subrogee to the rights of the estate of Theodore M. Riehle. Mr. Riehle was killed in a midair collision of two airplanes over the Washington National Airport November 1, 1949. Following the air collision numerous actions were brought on behalf of other persons

[1] Referred to hereinafter as Hartford.

and estates against the United States and Eastern Air Lines,[2] although Hartford sued only the United States. To save time and expense of separate and multiple trials, Hartford, together with other plaintiffs, stipulated with appellee to be bound by the decision of "test" cases which became known as the *Miller* cases. Appellee was attorney for the plaintiffs in the *Miller* and numerous other cases.

The stipulation provided that "no trial shall be had in any of the cases . . . until the *Miller* cases have proceeded to final judgment" and,

> the final decision in the *Miller* cases on the (a) question of liability of the various defendants named in the *Miller* cases, and (b) the question as to whether the Wrongful Death Statute of the District of Columbia or the Commonwealth of Virginia is applicable, shall be conclusive and binding on these issues upon all of the parties to this stipulation in each of the cases. . . . .

The stipulation was approved by the District Court. The *Miller* cases resulted in final decisions fixing liability upon the United States in amounts permitted by the wrongful death statute of Virginia, which limited recov-

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[2] The main litigation growing out of this disastrous accident has a considerable history. In *Union Trust Co. of District of Columbia* v. *United States*, 113 F. Supp. 80 (D.D.C. 1953), the District Court held against Eastern Airlines and the United States in wrongful death actions. On appeal we affirmed as to the United States but reversed as to Eastern Airlines and remanded for a new trial restricted to the issue of liability. *Eastern Airlines* v. *Union Trust Co.*, 95 U.S. App. D.C. 189, 221 F.2d 62. A petition for writ of certiorari was granted and our judgment reversed. 350 U.S. 907. On petition for rehearing, the Supreme Court stated that its order entered on p. 907, *ante*, is "reopened and is modified by directing that the case be remanded to the Court of Appeals to permit that court to pass upon the several issues left undecided by our reversal of its judgment." 350 U.S. 962. On remand we affirmed the judgments of the District Court against the airline company. *Eastern Air Lines* v. *Union Trust Co.*, 99 U.S. App. D.C. 205, 239 F.2d 25, *cert. denied*, 353 U.S. 942.

ery for each wrongful death to $15,000. *Eastern Air Lines v. Union Trust Co., supra.* Thereafter appellant settled the claim of Hartford for $14,500 and, by District Court decree of October 9, 1957, was awarded $2,900 as attorney's fees under 28 U.S.C. § 2678 (1952). Thereupon appellee filed with the District Court a petition to set aside this fee allowance and to require payment to appellee of "an amount equal to the reasonable and fair value" of appellee's services which had resulted in benefit to Hartford. In the proceedings incident to this petition the District Court found that appellee had rendered legal services in the cause that had benefited Hartford by making available to it the amount for which Hartford's action had been settled, and that for such services appellee was equitably entitled to compensation out of that amount. The court fixed $1,015 as a fair and reasonable allowance, and by the same order reduced by that amount the previous allowance of $2,900 to appellant. It is from this order appellant appeals.

The principal contentions of appellant are that Hartford never employed appellee as its attorney, that no common fund was created by appellee's services, and that Hartford had expressly refused to enter into an agreement, which many other litigants had made with appellee, under which he acted as chief counsel for numerous parties.

By entering into the separate agreement to which we have referred, and thus stipulating to await the outcome of the *Miller* cases and to be bound thereby, underscored by contributing to the costs of this basic litigation successfully conducted by appellee, Hartford we think enlisted the services of appellee to an extent that authorized the District Court, in the exercise of an equitable discretion,

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[3] The total of such fees could not exceed the maximum permitted by 28 U.S.C. § 2678 (1952). No question is made as to the reasonableness of the 7% allowance to appellee if any allowance at all could validly be made.

to award to appellee a reasonable portion of the attorney's fees to be paid by Hartford. The absence of a formal relationship of attorney and client is not decisive. *Sprague* v. *Ticonic Bank*, 307 U.S. 161; *Washington Gas Light Co.* v. *Baker*, 90 U.S. App. D.C. 98, 195 F.2d 29. While *Sprague* involved a different factual situation we believe the principles set forth therein are applicable here. By establishing the *Miller* claims appellee necessarily established in substance the claim of Hartford, and did this pursuant to the stipulation with Hartford. As the Supreme Court stated in *Sprague*, 307 U.S. at 167,

> when such a fund is for all practical purposes created for the benefit of others, the formalities of the litigation—the absence of an avowed class suit or the creation of a fund, as it were, through *stare decisis* rather than through a decree—hardly touch the power of equity in doing justice as between a party and the beneficiaries of his litigation.

Affirmed.

WILBUR K. MILLER, *Circuit Judge*, dissents.

(Filed Nov. 20, 1958)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1958

No. 14335

C.A. 1931-51

CORNELIUS H. DOHERTY, APPELLANT

v.

DAVID G. BRES, APPELLEE

Appeal from the United States District Court for the District of Columbia

Before: EDGERTON, WILBUR K. MILLER, and FAHY, *Circuit Judges.*

Judgment

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration whereof It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause be, and it is hereby, affirmed.

It is further ORDERED by the court that appellee herein recover from appellant his taxable costs on this appeal and have execution therefor.

Per Circuit Judge Fahy.

Dated: Nov. 20, 1958